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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/071,882	02/08/2002	Kristin A. McCloskey	WMO 3E4	8759
23581	7590	03/11/2004	EXAMINER	
KOLISCH HARTWELL, P.C. 520 S.W. YAMHILL STREET SUITE 200 PORTLAND, OR 97204			HECKENBERG JR, DONALD H	
			ART UNIT	PAPER NUMBER
			1722	

DATE MAILED: 03/11/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/071,882

Applicant(s)

MCCLOSKEY ET AL.

Examiner

Donald Heckenberg

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on December 15, 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 5-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1 and 5-14 is/are allowed.
- 6) ☒ Claim(s) 15-17 and 19 is/are rejected.
- 7) ☒ Claim(s) 18 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 February 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____.

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1. A request for continued examination (RCE) under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 15, 2003 has been entered.

2. The previously indicated allowability of claims 15-17 is withdrawn in view of the newly discovered references to Arden (U.S. Pat. No. 4,021,583) and Oliver (U.S. Pat. No. 4,156,516). Rejections based on the newly cited references follow.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. The factual inquiries set forth in Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), that are applied for

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establishing a background for determining obviousness under 35

U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary.

Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

6. Claims 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over McBride (U.S. Pat. No. 5,458,243; previously of record) in view of Arden and Oliver.

McBride discloses a multiple stack-tray assembly or kit with many of the features recited in claim 15 of the instant

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application. McBride notes that such stack-trays can be used for holding perishable food items (col. 1, ll. 14-16). The assembly comprises a base platform (16) with an alignment member (14) which extends upwardly from the base member (see figures 1-3, and col. 2, ll. 20-29). The assembly also includes plurality of stackable trays (12), with the trays including an alignment structure (30) configured to engage the alignment member of the base platform (see figures 3-4 and col. 3, ll. 13-23).

Although noting that the stack-trays can be used to hold perishable food items, McBride does not provide the assembly with a confection mixture configured to be dissolved in a solvent and then solidify into eatable confections. McBride also does not provide the assembly with instructions using the assembly along with a confection mixture.

Arden discloses frozen fruit confections and method of making the confections. The confections are as such that a confection mixture is configured to be dissolved in water, and then solidified upon freezing of the water into an eatable confection (col. 1, ll. 55-64). Arden notes that the mixture is designed to be poured into molds for the freezing process (col. 1, ll. 58-60).

Oliver discloses an apparatus and process shaping moldable materials. Oliver notes that apparatus such as the one he

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discloses can be used to shape frozen edible materials, such as ice creams and decorative ice shapes (col. 1, ll. 15-19).

Oliver provides the assembly with recipes and instructions for the convenience of the user (col. 7, ll. 37-44).

Thus, McBride, Arden and Oliver are all directed toward apparatus and processes for preparation of perishable edible products such as frozen confections. As such, with respect to claim 15 of the instant application, it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to have modified the assembly disclosed by McBride as such to provide the assembly with a confection mixture configured to be dissolved in water because this is a perishable food product which can be used with such as assemblies to produce eatable confections when the water is frozen as suggested by Arden. It further would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to have provided the assembly with instructions for use of the assembly and confection mixture because this provides convenience for a user of the such an assembly as suggested by Oliver.

With respect to claim 16 of the instant application, Arden notes that the steps in the process of making the disclosed confection mixture include making the confection solution in

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warm water (that is, water not being cooled to be frozen), filling the mold trays with the confection mixture, and cooling the mixture so as to freeze the solution into an eatable confection (col. 1, ll. 55-60). Thus, it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to have provided these steps in the instructions for use with the assembly suggested by the combination of McBride, Arden and Oliver because again, this would provide convenience for the user of the assembly.

With respect to claim 17 of the instant application, Arden discloses the use of different types of confection mixtures. For example, Arden discloses the use of different fruits in the mixture to produce different flavored products (col. 1, ll. 30-33). Thus, it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to have included a plurality of confection mixtures with the assembly suggested by McBride, Arden, and Oliver because this would have allowed for a plurality of different flavored confections to be included with the assembly as suggested by Arden.

7. Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over McBride in view of Arden.

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McBride discloses a multiple stack-tray assembly or kit with many of the features recited in claim 19 of the instant application. McBride notes that such stack-trays can be used for holding perishable food items (col. 1, ll. 14-16). The assembly comprises a base platform (16) with a vertical alignment member (14) which is located concentric with a central axis (see figures 1-3, and col. 2, ll. 20-29). The assembly also includes plurality of stackable trays (12), with the trays including an alignment apertures configured to engage the alignment member of the base platform as the trays are stacked (see figures 3-4 and col. 3, ll. 13-23). The configuration of the trays is such that they are rotatable about the central axis through sections of the vertical alignment member (see figures 1 and 2). Moreover, McBride's disclosure that the clamp element (38) operates to prevent rotation of the trays when the trays are in certain positions (col. 3, ll. 49-50) indicates the trays are rotatable when not engaged with the clamp element.

Although noting that the stack-trays can be used to hold perishable food items, McBride does not provide the assembly with a confection mixture configured to be dissolved in a solvent and then solidify into eatable confections.

Arden discloses frozen fruit confections and method of making the confections. The confections are as such that a

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confection mixture is configured to be dissolved in water, and then solidified upon freezing of the water into an eatable confection (col. 1, ll. 55-64). Arden notes that the mixture is designed to be poured into molds for the freezing process (col. 1, ll. 58-60).

Thus, both McBride and Arden are directed toward apparatus and processes for preparation of perishable edible products such as frozen confections. As such, it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to have modified the assembly disclosed by McBride as such to provide the assembly with a confection mixture configured to be dissolved in water because this is a perishable food product which can be used with such as assemblies to produce eatable confections when the water is frozen as suggested by Arden.

8. Applicant's arguments with respect to claim 19 have been considered but are moot in view of the new ground(s) of rejection.

It is noted that in response to the previous Office Action, Applicant argues that McBride does not disclose a confection mixture as recited in claim 19 of the instant application. Upon reconsideration of the claim, the disclosure of the application,

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and in light of Applicant's argument, it has been decided the recited confection mixture in claim 19 should be given patentable weight as it is a necessary part of the claimed invention, and not merely the intended use of a claimed apparatus. A new rejection on the merits of the reinterpreted claim is thus set forth above.

9. Claims 1 and 5-14 are allowed.

10. Claim 18 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

11. The following is a statement of reasons for the indication of allowable subject matter:

The prior art of record does not teach or suggest a toy or kit for making confections as set forth in claims 1 or 18 of the instant application. Specifically, none of the prior art of record discloses the base platform structure to include a dispenser receptacle. The closest prior art to this feature is disclosed by Gay et al. (U.S. Pat. No. 4,215,843; previously or record), who discloses a dispenser (38) to be included with a

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toy molding apparatus. Gay however does not disclose the dispenser receptacle to be part the base platform, instead Gay discloses the dispenser to be provided within a housing (12) of the apparatus in order to heat the dispenser (col. 4, l. 20 - col. 5, l. 13). Moreover, there is no suggestion in Gay, nor the other prior art of record, of how a base platform, such as the one disclosed by McBride (described above), could be modified to include such a dispenser.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Donald Heckenberg whose telephone number is (571) 272-1131. The examiner can normally be reached on Monday through Friday from 9:30 A.M. to 6:00 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Wanda Walker, can be reached at (571) 272-1151. The official fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status

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information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <<<http://pair-direct.uspto.gov>>>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at (866) 217-9197 (toll-free).



Donald Heckenberg
March 2, 2004